

UNITED STATES DISTRICT COURT  
NORTHERN DISTRICT OF ILLINOIS  
EASTERN DIVISION

IN RE: NATIONAL COLLEGIATE ) MDL No. 2492  
ATHLETIC ASSOCIATION STUDENT-ATHLETE ) No. 13 C 9116  
CONCUSSION INJURY LITIGATION. ) Chicago, Illinois  
July 14, 2016  
2:00 o'clock p.m.

TRANSCRIPT OF PROCEEDINGS  
BEFORE THE HONORABLE JOHN Z. LEE

APPEARANCES:

For the Plaintiffs HAGENS BERMAN SOBOL SHAPIRO, L.L.P.  
and Proposed Class: BY: MR. STEVE W. BERMAN  
1918 8th Avenue  
Suite 3300  
Seattle, Washington 98101  
(206) 623-7292

HAGENS BERMAN SOBOL SHAPIRO, L.L.P.  
BY: MS. ELIZABETH A. FEGAN  
455 North Cityfront Plaza Drive  
Suite 2410  
Chicago, Illinois 60611  
(708) 628-4960

SIPRUT P.C.  
BY: MR. TODD L. McLAWHORN  
17 North State Street  
Suite 1600  
Chicago, Illinois 60602  
(312) 236-0000

For Plaintiff Whittier: COATS ROSE YALE RYMAN & LEE, P.C.  
(on phone) BY: MR. DWIGHT E. JEFFERSON  
9 Greenway Plaza  
Suite 1100  
Houston, Texas 77046  
(713) 651-0111

1 APPEARANCES (Continued):

2 For Lead Objector EDELSON P.C.  
3 Nichols and BY: MR. JAY EDELSON  
4 Intervenor Plaintiffs: MR. BENJAMIN S. THOMASSEN  
MR. BENJAMIN H. RICHMAN  
350 North LaSalle Street  
5 Suite 1300  
Chicago, Illinois 60654  
6 (312) 589-6370

7 (on phone) RAIZNER SLANIA, L.L.P.  
8 BY: MR. JEFFREY L. RAIZNER  
2402 Dunlavy Street  
Houston, Texas 77006  
9 (713) 554-9099

10 For Defendant NCAA: LATHAM & WATKINS, L.L.P.  
11 BY: MR. MARK S. MESTER  
MS. JOHANNA M. SPELLMAN  
12 330 North Wabash Avenue  
Suite 2800  
13 Chicago, Illinois 60611  
14 (312) 876-7700

15  
16  
17  
18  
19  
20  
21  
22 COLLEEN M. CONWAY, CSR, RMR, CRR  
23 Official Court Reporter  
24 219 South Dearborn Street, Room 1714  
Chicago, Illinois 60604  
25 (312) 435-5594  
*colleen\_conway@ind.uscourts.gov*

1 (Proceedings heard in open court:)

2 THE CLERK: 13 C 9116, NCAA Student-Athlete  
3 Concussion Injury Litigation.

4 MR. BERMAN: Good afternoon, Your Honor. Steve  
5 Berman and Elizabeth Fegan on behalf of plaintiffs and proposed  
6 class.

7 MR. MESTER: Good afternoon, Your Honor. Mark Mester  
8 and Johanna Spellman on behalf of the NCAA.

9 MR. EDELSON: Good afternoon, Your Honor. Jay  
10 Edelson with Ben Richman and Ben Thomassen. We're back with  
11 you again representing a personal injury class.

12 MR. McLAWHORN: Todd McLawhorn also on behalf of  
13 plaintiffs and the proposed class.

14 THE COURT: Who do we have on the phone?

15 MR. JEFFERSON: Dwight Jefferson on behalf of  
16 Plaintiff Mildred Whittier for Julius Whittier.

17 THE COURT REPORTER: I'm sorry. I can't understand  
18 him.

19 THE COURT: Mr. Jefferson, could you speak more  
20 clearly and slow down, please.

21 MR. JEFFERSON: Yeah. Dwight Jefferson for Plaintiff  
22 Mildred Whittier as next friend for Julius Whittier.

23 THE COURT: Who else do we have on the phone?

24 MR. RAIZNER: And, Your Honor, Jeff Raizner. I'm  
25 co-counsel with the Edelson firm on some of the newly filed

1 class action litigation.

2 THE COURT: Anyone else on the phone? Okay.

3 On January 26th, 2016, the Court preliminarily  
4 approved the amended proposed settlement agreement and  
5 conditionally certified the settlement class, but the Court did  
6 so on the condition that the parties either agree to certain  
7 modifications or provide additional evidence to allay the  
8 Court's concerns that were identified in that order.

9 Those modifications proposed by the Court include:

10 (1) creating subclasses for student-athletes in contact and  
11 non-contact sports; (2) requiring notification of class members  
12 via the NCAA's website as well as other social media in order  
13 to supplement the notice plan; (3) omitting provisions  
14 requiring a class member to submit a claim to his or her health  
15 insurance company, or permitting subrogation or reimbursement  
16 from a class member or the insurance company; (4) extending the  
17 medical monitoring period if sufficient funds are available at  
18 the end of the monitoring period; (5) requiring that the \$5  
19 million contribution from the NCAA for concussion-related  
20 research go to research that would otherwise not have occurred  
21 absent the settlement; (6) implementing publicity campaigns  
22 during the medical monitoring program on the 10-year, 20-year,  
23 30-year, and 40-year anniversaries of the commencement of the  
24 program to ensure that class members remain aware of the  
25 program's availability; (7) enabling the Court to request and

1 require reports from those in charge of the program as needed;  
2 and (8) excluding class counsel from the waiver of future  
3 claims. The settling plaintiffs and the NCAA have now agreed  
4 to those modifications.

5 The remaining modification proposed by the Court  
6 addressed the scope of the release contained in the amended  
7 settlement agreement. As part of the settlement, the class  
8 members would have to release any and all claims "brought or  
9 pursued on a class-wide basis and relating to concussions or  
10 sub-concussive hits or contact." However, they still would  
11 retain the right to bring individual personal or bodily injury  
12 claims and class claims that do not relate in any way to  
13 medical monitoring or medical treatment of concussions or  
14 sub-concussive hits or contact. Effectively, this would mean  
15 that, while a class member would retain the right to sue the  
16 NCAA individually to recover damages for bodily injury claims,  
17 he or she would no longer be able to participate in a class  
18 action of any scope against the NCAA in order to assert those  
19 claims on a class-wide basis.

20 In reviewing the overall fairness of the amended  
21 complaint, the Court in January assessed the strength and value  
22 of the released procedural claims of the putative class against  
23 the value of the settlement to the class. In so doing, the  
24 Court found that, based on the record presented by the parties,  
25 it was highly unlikely that a nationwide class of current or

1 former NCAA student-athletes or a class consisting of current  
2 or former NCAA student-athletes from multiple schools could be  
3 certified under Rule 23(b)(3) or Rule 23(c)(4) for the purpose  
4 of asserting bodily injury claims for damages. However, at  
5 that time, the Court also held that the parties had not  
6 provided sufficient evidence to ascertain the likelihood of  
7 class certification for a class action brought by current or  
8 former NCAA student-athletes from a single NCAA-affiliated  
9 school. Accordingly, the Court approved the proposed release  
10 of class-wide claims, but only to the extent that it precluded  
11 actions brought by a nationwide class or a class that consists  
12 of current or former student-athletes from more than one  
13 NCAA-affiliated school.

14 After engaging in multiple additional rounds of  
15 negotiations, the settling plaintiffs and the NCAA now agree  
16 that the release of class-wide bodily injury damages claims  
17 will not extend to those cases where the class consists of  
18 current or former student-athletes of a single sport at a  
19 single NCAA-affiliated school. However, they request that the  
20 Court permit the release to preclude cases where the class  
21 consists of current or former student-athletes from more than  
22 one sport even if they're from the same school. Put another  
23 way, under the new proposal, members of a football team from a  
24 single NCAA school would be able to sue the NCAA, as well as  
25 its affiliates, on a class-wide basis to recover damages based

1 on bodily injury claims; however, a class consisting of members  
2 from both the football team and the hockey team from that same  
3 school would not.

4 To buttress their argument, the settling plaintiffs  
5 and NCAA have supplemented the record with additional evidence  
6 obtained during discovery. And counsel for Lead Objector  
7 Anthony Nichols has withdrawn his objection to the settlement  
8 based upon the new revisions and has submitted a response  
9 setting forth some of his positions with regard to some of the  
10 arguments made by the NCAA in its submissions.

11 Finally, the other attorneys in the related actions  
12 also have been provided an opportunity to file objections to  
13 this most recent proposal, and none have been filed to date.

14 So after reviewing the additional materials submitted  
15 by the parties, the Court agrees and finds it is highly  
16 unlikely that a multiple-sport, single-school, bodily injury  
17 class would be sufficiently cohesive to warrant certification  
18 under Rule 23(b)(3) and, therefore, the Court finds the value  
19 of such a procedural claim, that is, the ability to file a  
20 bodily injury class action for damages on behalf of  
21 student-athletes for multiple sports even at a single school,  
22 is minimal, at best.

23 Accordingly, for these reasons, which will be set  
24 forth in a more complete fashion in a written opinion that will  
25 be issued shortly, as well as the reasons set forth in my

1 January order, the Court finds on balance that the  
2 second-amended settlement agreement and release is within the  
3 range of possible approval. Therefore, the Court grants the  
4 joint motion for preliminary approval of a second-amended class  
5 action settlement agreement and certification of settlement  
6 class and subclasses.

7 In accordance with Rule 23(b)(2), the Court  
8 conditionally certifies a settlement class of "all persons who  
9 played an NCAA-sanctioned sport at an NCAA member institution  
10 on or prior to the preliminary approval date," and  
11 conditionally certifies the following subclasses, "all persons  
12 who played an NCAA-sanctioned contact sport at an NCAA member  
13 institution on or before" -- "on or prior to the preliminary  
14 approval date," as well as, "all persons who played an  
15 NCAA-sanctioned non-contact sport at an NCAA member institution  
16 on or prior to the preliminary approval date."

17 Furthermore, the Court preliminarily approves the  
18 second-amended class action settlement agreement and release  
19 and finds that the second-amended settlement agreement is  
20 within the range of possible approval.

21 So, as I noted, a more complete written opinion will  
22 be issued shortly.

23 So let's talk about deadlines. The plaintiffs in  
24 their submissions had a chart that talked about some of the  
25 deadlines that would be coming up in this case once preliminary

1 approval is granted. Now that it is today, I wanted to work  
2 through some of these dates with you.

3 MR. BERMAN: I have a chart that --

4 THE COURT REPORTER: Counsel, your name again?

5 MR. BERMAN: I'm sorry. Steve Berman on behalf of  
6 the class, Your Honor.

7 I have a chart that assumes, and not lightly, that  
8 you sign the agreement today, and it has updated dates if that  
9 would be helpful to you. May I hand that up?

10 THE COURT: Yes, please.

11 (Document tendered to Court.)

12 MR. BERMAN: I don't have a chart. I actually have a  
13 preliminary approval order that has the dates.

14 I actually have an easier version, Your Honor, if I  
15 may approach? One I have been working on that's easier.

16 (Document tendered to Court.)

17 THE COURT: All right. Let's do this. Do you have  
18 this chart that was in -- that was submitted in your  
19 memorandum?

20 MR. BERMAN: Yes. I can pull that out. It was in  
21 our brief.

22 THE COURT: It's on page 12. Because that's what I  
23 was using.

24 MR. MESTER: Okay.

25 THE COURT: Well, actually, I think it's in the --

1 perhaps it's in the proposed order that was submitted at the  
2 time.

3 MR. MESTER: Judge, so -- sorry. Mark Mester on  
4 behalf of NCAA.

5 We have a chart, Your Honor, as part of the  
6 memorandum in support of the joint motion for preliminary  
7 approval.

8 MR. BERMAN: Is this it?

9 MR. MESTER: Page 13.

10 THE COURT: What page is that?

11 MR. BERMAN: Page --

12 MR. MESTER: Page 13.

13 MR. BERMAN: -- 13.

14 MR. JEFFERSON: Well, Judge, is that the order that  
15 is referenced in the --

16 THE COURT: Mr. Jefferson, hold on for a second.

17 Could I see a copy of that chart, please?

18 (Document tendered to Court.)

19 THE COURT: Yes, that's exactly what I'm referring  
20 to.

21 All right. So let's work from this chart. So within  
22 five days of preliminary approval, the settlement website  
23 established and basic settlement documents posted, that would  
24 be 7/21.

25 Is that date still agreeable?

1 MR. BERMAN: Yes, Your Honor. We've actually been  
2 working on the website materials.

3 MR. MESTER: Yes, Your Honor.

4 THE COURT: Okay. Then within 15 days of today --  
5 that's July 29th -- that letter should be sent to NCAA member  
6 institutions requesting settlement class member contact  
7 information, publication, notice should be published, call  
8 center established, notice via social media is to commence.

9 Is that still agreeable?

10 MR. MESTER: Yes, Your Honor. We've been working on  
11 that draft as well.

12 THE COURT: Now, in that paragraph, it states, "XXX  
13 day claim period begins." What is that in reference to?

14 MR. BERMAN: The date notice is sent out.

15 MR. MESTER: No.

16 MR. BERMAN: No, that's not right.

17 MR. MESTER: I think -- with due respect, Your Honor,  
18 I think it refers to the total -- the totality of the duration  
19 of the claims period.

20 THE COURT: Okay. So basically -- and I guess I'm  
21 trying to understand why the claims period -- what you're  
22 referring to when you say "claims period."

23 All right. So --

24 MR. MESTER: Mr. Berman's draft.

25 THE COURT: All right. This is --

1 MS. FEGAN: Typically, Your Honor, we put that there.  
2 It's the period during which either there'd be claims which  
3 doesn't apply here or they can have time to exclude themselves  
4 or to object.

5 THE COURT: Okay. So let's get rid of that because  
6 that's not necessary here.

7 MR. JEFFERSON: I didn't --

8 THE COURT: So then --

9 MR. JEFFERSON: -- hear that, Judge. That's a period  
10 to file an objection?

11 THE COURT: No. We'll get to that, Mr. Jefferson.

12 Okay. So then we have this -- basically the parties  
13 have estimated that notice will be provided -- that you will be  
14 able to provide notice individually by mail within six months  
15 of today. Is that correct?

16 MR. MESTER: Yes, Your Honor.

17 THE COURT: Okay. So by January 13th, I would like  
18 plaintiffs' class counsel to submit a declaration of proof of  
19 mailing and publishing notice as well as their petition for  
20 attorneys' fees and expenses.

21 At that date, Mr. Edelson, the lead objector should  
22 also file a petition for attorneys' fees and expenses to the  
23 extent you are going to file one.

24 MR. EDELSON: Thank you, Your Honor.

25 THE COURT: Okay?

1 MR. JEFFERSON: Is that for all objectors, Judge?

2 THE COURT: Yes, all objectors may, along with a  
3 petition.

4 So then the question becomes how much longer after  
5 January 13th should the class be given an opportunity to either  
6 exclude themselves or to object.

7 And while this proposal I think gives 28 days, I  
8 think given the case and the amount of information that is  
9 involved here, I think it's appropriate to have that period be  
10 doubled to eight weeks. Okay? So the deadline for class  
11 members to exclude themselves or to file objections would be  
12 March 10th.

13 Then by March 31st, 21 days later, I would like  
14 plaintiffs' class lead counsel to file a motion for final  
15 approval of a settlement and -- well, you've already filed a  
16 petition for an award of attorneys' fees and expenses.

17 In the original chart, Mr. Berman, you had proposed  
18 that the motion for final approval be filed basically right  
19 after the six months' notice period. At that point in time, I  
20 find it hard to believe that you would have any additional  
21 information than you do now that would support a final motion  
22 for approval. At least if you wait till after the objection  
23 period, you'd have some additional bases, perhaps, given the  
24 percentage of objectors, number of people that have excluded  
25 themselves, et cetera, et cetera, that would provide you with

1 more information on which to move for final approval.

2 MR. BERMAN: That's fine with me, Your Honor.

3 THE COURT: Okay. So the motion for final approval  
4 should be filed by March 31st.

5 With regard to the declarations of class action  
6 settlement administrator and settlement notice administrator, I  
7 want those to be filed by April 21st. And I am going to set  
8 the final approval hearing to be May 5th of next year. It will  
9 be May 5th, and we will start at 10:00 a.m.

10 Any comments, concerns, questions regarding that  
11 timetable?

12 MR. BERMAN: Not from me, Your Honor.

13 THE COURT: Okay.

14 MR. MESTER: No, Your Honor.

15 THE COURT: One thing I would like to add, though, is  
16 as soon as the last mailings go out and you can confidently  
17 state that you have completed the task of sending out  
18 individual notice, which would be, I presume, somewhere around  
19 the 180-day period, I would like either counsels for the  
20 plaintiffs or the NCAA to submit a status report with regard to  
21 status of notice.

22 MR. MESTER: Yes, Your Honor.

23 THE COURT: If it's done before then, you can file it  
24 early and then perhaps we can move some of the dates up.

25 MS. FEGAN: Okay.

1 MR. MESTER: Your Honor, likewise, these were  
2 obviously our best good-faith estimates. If in -- I assume you  
3 would prefer that if we encounter issues that we weren't  
4 anticipating that we let you know as soon as possible?

5 THE COURT: Yes. The sooner, the better.

6 MR. MESTER: Understood.

7 THE COURT: Okay. So I do want to talk briefly about  
8 the tagalong cases for a second, but before we get there, are  
9 there any other issues that at this point we need to address  
10 with regard to the settlement?

11 MR. BERMAN: Yes. There's one other issue, Your  
12 Honor. In order for us to effectuate the process of going  
13 forward, we would ask the Court to enter the stipulated  
14 qualified HIPAA protective order. That's -- I have a copy  
15 here. I don't -- you may have it.

16 (Document tendered to Court.)

17 THE COURT: That's fine. I'll enter the order.

18 MR. BERMAN: Okay.

19 THE COURT: Anything else with regard to the  
20 settlement?

21 MR. MESTER: No, Your Honor.

22 MR. BERMAN: No, Your Honor.

23 THE COURT: Okay.

24 MR. JEFFERSON: Your Honor, I have one question about  
25 the settlement.

1 THE COURT: Yes. And, Mr. Jefferson, I think -- can  
2 you put your mouth closer to the receiver? We're just having a  
3 really difficult time --

4 MR. JEFFERSON: Yeah, Judge.

5 THE COURT: -- hearing you.

6 MR. JEFFERSON: I'm kissing it right now. Can you  
7 all hear me? Can you hear me now? I got it up as --

8 THE COURT: Yes.

9 MR. JEFFERSON: -- loud as I can get it.

10 THE COURT: That is better. And if you could speak  
11 slowly, sir.

12 MR. JEFFERSON: Yes, Judge. The only question I  
13 had -- and I don't know. I mean, I might have missed the  
14 chance to ask this question or not, and that is, you know,  
15 relating to the personal injury class action. And I was just  
16 noting from review of the plaintiffs' memorandums in support  
17 where they reference the order on page 29 as it relates to the  
18 narrow time period during which substantially similar  
19 concussion-related practices and policies was essentially  
20 applied. That's not placing any specific time period or date  
21 in there, is it?

22 THE COURT: I certainly didn't take it that way,  
23 Mr. Jefferson. I don't know if that answers the question or  
24 not.

25 Mr. Edelson, do you have a sense of what

1 Mr. Jefferson is speaking about?

2 MR. EDELSON: It was hard for me to understand what  
3 he was saying, so I apologize, I have nothing to add.

4 THE COURT: Mr. Jefferson, we're just having a very  
5 difficult time hearing you, and I --

6 MR. JEFFERSON: You guys can't hear me at all?

7 THE COURT: That's -- why don't you -- if you could  
8 just speak slowly, slower, I think that would be helpful.

9 MR. JEFFERSON: Yes, Judge. I was referencing page 8  
10 of plaintiffs' memorandum in support of the second or, rather,  
11 the amended --

12 THE COURT: Okay.

13 MR. JEFFERSON: -- settlement and the reference  
14 therein to footnote No. 25 which follows the statement that a  
15 single-sport, single-school class limited to a particular sport  
16 and a narrow time period "during which substantially similar  
17 concussion-related practices and policies were consistently  
18 applied." My query was whether or not the final settlement  
19 will contain specific dates that would represent this narrow  
20 time period that's referenced.

21 THE COURT: No, it won't, because I think what they  
22 were doing there was they were quoting from my order of  
23 January, and that certainly wasn't intended to require them to  
24 set forth specific time frames. It was by -- it was merely by  
25 explanation of the grounds for my order.

1 MR. JEFFERSON: Thank you, Your Honor.

2 THE COURT: Okay. Thank you, Mr. Jefferson.

3 Anything else that we need to address today with  
4 regard to the settlement and implementation of the settlement?

5 MR. BERMAN: Nothing that I know of, Your Honor.

6 MR. MESTER: No, Your Honor.

7 MR. JEFFERSON: All right.

8 THE COURT: So --

9 MR. JEFFERSON: So you will be issuing an order with  
10 all of those deadlines and dates in it, that's correct?

11 THE COURT: Yes, I will be. And, actually, what I'd  
12 prefer to have is I'd prefer to have -- Mr. Berman, if you can,  
13 or, Ms. Fegan, if you could submit to my *proposed\_order* inbox a  
14 proposed order just with the timetable, that would be helpful.

15 MR. BERMAN: We will. I think we'll meet and make  
16 sure we're in agreement --

17 MR. MESTER: Sure.

18 MR. BERMAN: -- right after this and then we'll  
19 submit a draft.

20 THE COURT: Okay. So given those deadlines, let's go  
21 ahead and set a status date in this case just so that I can  
22 monitor how things are going with regard to particularly the  
23 issues of notice and getting addresses.

24 Carmen, give me a date of the week of December 5th.

25 THE CLERK: We're on trial.

1 (Court conferring with his clerk.)

2 THE CLERK: December 8th --

3 MR. JEFFERSON: Judge?

4 THE COURT: Okay.

5 MR. BERMAN: What day of the week is that?

6 THE CLERK: It's a Thursday.

7 December 8th at 2:00 p.m. or --

8 THE COURT: 9:00 a.m.

9 THE CLERK: 9:00? December 8th at 9:00 a.m.

10 THE COURT: And we will establish a conference  
11 call-in number. It's merely going to be really to -- for me to  
12 get a handle on where we are with regard to notice. Okay?

13 MR. MESTER: Sure.

14 THE COURT: All right. So I have received -- moving  
15 on to the tagalong cases. So I have seen the orders come in  
16 with regard to these various cases that were filed in various  
17 forums everywhere against single schools, and I haven't talked  
18 to anyone at the MDL panel yet. The -- and I don't know  
19 whether -- I guess my question is, has anyone in the MDL panel  
20 reached out to any of the parties here with regard to whether  
21 or not those cases should be tagalong cases to this MDL or  
22 whether they raise issues that are sufficiently different from  
23 this MDL -- from this particular MDL that they're appropriate  
24 for additional analysis by the MDL panel or -- and/or whether  
25 they should come in under a different MDL number?

1 MR. MESTER: Your Honor, we filed the notice  
2 initially with the panel and certainly suggested that they  
3 should be part of this MDL, and our --

4 THE COURT: That they should or should not?

5 MR. MESTER: They should be. And our understanding  
6 is that the clerk agreed, as this is the process, and issued  
7 the conditional orders, which I think became final today.

8 But, as I understand it, certainly it was -- our  
9 notice said that, and it was -- no one suggested otherwise, it  
10 was to be part of this MDL.

11 THE COURT: Now, Mr. Edelson, what are your thoughts?

12 MR. EDELSON: We did not object to that. For us,  
13 we're comfortable wherever. And we definitely agree that there  
14 should be an MDL. In terms of whether it's this MDL or there  
15 should be a new number, that's not relevant to -- or it's not  
16 really within our system-making authority.

17 What we would ask is if it does remain in this MDL is  
18 that we have two separate tracks that are clearer. I don't  
19 think Mr. Berman needs us to show up, you know, at status  
20 hearings, and he's welcome to come, you know, whatever happens  
21 in ours, but I don't think he ought to be required to. Just so  
22 there's a little bit more clarity there.

23 THE COURT: And I guess that's what raises the  
24 questions for me, is kind of looking for -- looking ahead --  
25 can't really say I'm looking forward. But looking ahead --

1 (Laughter.)

2 THE COURT: -- to the -- dealing with all of the  
3 various individual cases on some sort of consolidated basis --  
4 consolidated, that term used very loosely -- I think that those  
5 cases would raise issues that are very different in kind than  
6 the ones that we've been dealing with in this particular case.

7 So, as I told -- informed the parties, I'm happy to  
8 oversee an MDL with all of the individual -- the class action  
9 bodily damages claims against the individual schools and the  
10 NCAA. I am just wondering whether as an administrative matter  
11 it makes sense to have those cases in this MDL versus another  
12 MDL by number because of the two tracks that you referenced.

13 And, frankly, I don't know if the MDL panel really  
14 cares how I proceed with regard to the cases as long as I'm  
15 dealing with the cases. But it just kind of raises some  
16 questions in my mind about how best to proceed dealing --  
17 starting to deal with those other cases, which I think we need  
18 to start kind of dealing with soon.

19 MR. EDELSON: Your Honor, I personally would prefer  
20 if there's a different number and a different name just to  
21 avoid confusion. You know, it would be an odd situation where  
22 there'll be a settlement going forward as litigation is  
23 happening, too. It's not, you know, unheard of, but a little  
24 unusual. I assume, I assume that the defendants don't have a  
25 different view. And --

1 MR. MESTER: (Nodding.)

2 MR. EDELSON: -- we could probably call the panel and  
3 ask for their guidance. We assume you have a bat phone or  
4 something which gets to the MDL directly. But we're happy to  
5 do it on our own.

6 MR. MESTER: At least at this point.

7 THE COURT: Why don't we do this. Why don't I make  
8 some inquiries and then if it's just procedurally more  
9 efficient to have the -- or procedurally necessary to have the  
10 parties present their request to the MDL, I'll reach out to you  
11 and let you know. Okay? But I do know that those cases are  
12 all lining up and we're going to have to deal with them sooner  
13 rather than later. All right?

14 MR. EDELSON: Okay.

15 THE COURT: Along those lines, Mr. Edelson, is there  
16 something that you want to report that we need to address with  
17 regard to those other cases?

18 MR. EDELSON: Yes. Those -- I think that you're  
19 aware of at least seven. There are 15 filed and there are more  
20 to come.

21 THE COURT: How many more? To your knowledge.

22 MR. EDELSON: The -- there will be dozens of cases  
23 filed. We're trying to get them filed over the next six to  
24 eight weeks.

25 We do have some thoughts about how to handle this

1 efficiently. First of all, we've been talking to defense  
2 counsel, and everybody so far -- I don't mean -- I have not  
3 spoken to everybody, but everyone we've spoken to has agreed  
4 that we should stay discovery and stay everything until there's  
5 an orderly process.

6 What we don't want is the cases to be going at  
7 different stages. It may be that there are groups. My  
8 personal view, just to flag it, is that there should be  
9 bellwether cases so Your Honor isn't dealing with 50 different  
10 motions to dismiss dealing with different states and all of  
11 that.

12 It -- ideally what I'd like to come out of here with  
13 is kind of a general order staying everything for some time,  
14 appointing us interim lead for a limited purpose of just  
15 scheduling, just trying to organize everything with the  
16 defendants so we can come back with a proposal for how to  
17 handle these in an efficient way. During that time, we would  
18 move for more formal interim lead and would propose a slate of  
19 other attorneys who would be part of the lead structure.

20 THE COURT: Anything to add, Mr. Mester?

21 MR. MESTER: Your Honor, I only speak for the NCAA,  
22 obviously, at this point. There are a number of other  
23 defendants. But I certainly have no problem with that.

24 THE COURT: All right. And so that all raises --  
25 that goes to the point of perhaps having it under a different

1 number. Its own kind of standalone number might make a lot of  
2 sense given the fact that we have the cases that are currently  
3 under this or the -- previously before today was under this  
4 number, all a part and parcel of the settlement that was  
5 preliminarily approved today. And I think there could be  
6 danger of confusion as to, well, what is part of the  
7 settlement, what isn't part of the settlement, and I think that  
8 could be avoided. But, again, I will make an inquiry. And if  
9 I need you all to do anything, I'll let you know. Okay?

10 MR. EDELSON: Thank you, Your Honor.

11 MR. JEFFERSON: Now, Judge, can I ask you one other  
12 question regarding the current case?

13 THE COURT: The current case? Yes.

14 MR. JEFFERSON: Is it my understanding, then, that  
15 the final hearing that the Court has referenced will be the  
16 fairness hearing where if anybody has any final objections or  
17 anything to make to the settlement, they could be made at that  
18 time?

19 THE COURT: Yes. The objections will be due -- as I  
20 stated, any objections must be filed by March 10th.

21 MR. JEFFERSON: And then -- and I don't mean to  
22 ignore the Court, but let me ask you one other question, too.

23 One of the concerns that I had had from reviewing all  
24 of the evidence in the case regarding the settlement and what  
25 is commonly known before was the take rate on -- I mean, how

1 many people are really going to take advantage of this.

2 THE COURT: I'm sorry. The what?

3 MR. JEFFERSON: The take rate.

4 THE COURT: Okay.

5 MR. JEFFERSON: The number of people who -- in the  
6 class who will actually take advantage of it.

7 Is there any in there a threshold number where if the  
8 rate does not exceed the certain percentage or something by a  
9 certain date and then something else happens, does it just roll  
10 off in the next 50 years if people aren't taking advantage of  
11 it?

12 THE COURT: Okay. I think there are kind of -- I  
13 guess, Mr. Jefferson, I thought you were asking one question,  
14 but, in fact, you were asking another, but I think both are  
15 worth addressing.

16 First of all, the settlement does not contain a  
17 minimum number. That was part and parcel of the analysis done  
18 by Bruce Deal as part of his analysis of how many people he  
19 estimates will not only take part -- qualify, but also take  
20 part in the monitoring program as part of his analysis, as you  
21 may recall, to demonstrate the sufficiency of the funds that  
22 the NCAA is putting into the monitoring program.

23 The other question I think -- I thought you were  
24 asking, but it did raise a question in my mind, is kind of  
25 the -- is there a threshold number, percentage of opt-outs that

1 would nullify the settlement, and I don't believe there is.

2 Is that correct?

3 MR. BERMAN: There is no "blow provision," Your  
4 Honor.

5 THE COURT: Right.

6 MR. MESTER: I'm not sure that's right, Your Honor.

7 MR. JEFFERSON: Don't exist? What's it been called?  
8 Judge, I didn't hear what he said.

9 THE COURT: The -- there's -- typically in settlement  
10 agreements like this, there's a provision that says that if  
11 beyond a certain percentage of class members opt out, then the  
12 NCAA or defendants have the option of voiding the settlement.

13 What is that percent?

14 MR. MESTER: Well, Your Honor, there is one we  
15 believe we submitted, as is fairly typical, under seal. So you  
16 have it, but --

17 THE COURT: Okay. No, I seem to recall, yes.

18 So the -- there is a number, the -- was the number  
19 served? Was that just to me --

20 MR. MESTER: It's --

21 THE COURT: -- in chambers?

22 MR. MESTER: -- under seal, Your Honor.

23 MR. JEFFERSON: There is a -- there is an opt-out in  
24 the settlement number, Judge?

25 THE COURT: No, no. Mr. Jefferson, what we're

1 talking about is there is a threshold number. Basically if a  
2 certain number of -- percentage of the class members -- and I  
3 don't know how exactly to determine how many class members  
4 there are since there's approximately 4.2 million. But if a  
5 certain percentage of them opt out, that that would allow the  
6 NCAA --

7 MR. MESTER: It was actually, Your Honor -- I  
8 apologize. It was -- it's an absolute number to address that  
9 very concern.

10 MR. JEFFERSON: I understand that, Judge, on the  
11 opt-out provision.

12 THE COURT: Yes.

13 MR. JEFFERSON: My question was more in line with  
14 what you were saying, and that is provided the settlement is  
15 approved and that initial opt-out number does not stop the  
16 settlement or allow the NCAA to withdraw but, rather, the  
17 settlement proceeds forward, do we have any -- anything in the  
18 settlement that sets, as you mentioned earlier, a minimum to  
19 where if by this time X percentage or whatever of the class  
20 members had not taken advantage, then what happens to the  
21 money?

22 THE COURT: There is not.

23 All right. Anything else. Yes?

24 MR. BERMAN: Yes, Your Honor. I just didn't want to  
25 lose sight of one aspect of the class case that actually is a

1 personal injury case, and that is Owens and Solomon, two of the  
2 named plaintiffs who we say have very serious injuries, have  
3 put those injuries aside to help the class, but we're also  
4 going to be now needing a schedule and to litigate the injury  
5 part of their case, which somewhat is going to be overlapping  
6 with some of the issues you're going to be dealing with.

7 THE COURT: Yes. No, I understand. And I think same  
8 with -- Mr. Arrington also has a personal injury class -- or a  
9 personal injury claim for himself --

10 MR. BERMAN: That's correct.

11 THE COURT: -- that was asserted as part of the  
12 original complaint --

13 MR. BERMAN: Correct.

14 THE COURT: -- that we still have to address, which  
15 is all the more reason why it would be nice to separate the  
16 two --

17 MR. EDELSON: Well --

18 THE COURT: -- MDLs.

19 MR. BERMAN: I don't take a position. Whatever is  
20 easier for you. I just -- at some point, I want to get a  
21 schedule for my clients who have been waiting for a long time  
22 now.

23 MR. EDELSON: Well, Your Honor, I'm sorry, just to  
24 add a little bit because there may be some confusion.

25 In the MDL, there will be class actions filed, but

1     also more individual cases. So we think that there should be  
2     an orderly process for all of those. And I don't think that --  
3     I mean, Mr. Berman can certainly make whatever arguments he  
4     wants about whether his cases should go first or whether he  
5     should be involved in the broader MDL, but I don't think that  
6     that should be presumed.

7             THE COURT: As I said, it's -- it just provides more  
8     support in my mind of why it would be helpful to have the  
9     personal injury claims, whether class or individual, in one MDL  
10    separate and apart from the medical monitoring issues and all  
11    the things that we're dealing with here.

12            So yes, Mr. Berman, I am well aware of the remaining  
13    claims with regard to the individual --

14            MR. BERMAN: Thank you, Your Honor.

15            THE COURT: -- personal injury claims. All right.

16            MR. JEFFERSON: Judge, can I ask you one other  
17    question in that regard?

18            THE COURT: One more, Mr. Jefferson.

19            MR. JEFFERSON: Thank you, Judge. I appreciate it.

20            My client, as you know, Judge, is -- his condition  
21    has worsened. He's been moved out of his home into an assisted  
22    care facility.

23            And so is it my understanding, then, of the  
24    settlement that as someone who is currently diagnosed with a  
25    related injury, personal injury, that he would not be included

1 in the class as it stands now? Is that right?

2 THE COURT: No. He would be included in the class,  
3 but he would have the right to pursue his personal injury  
4 damages claim regardless of this particular settlement.

5 All right. So, Mr. Jefferson, if you have any  
6 further questions about the structure of the settlement, what I  
7 would suggest to you is why don't you give Mr. Berman a call or  
8 Ms. Fegan a call, and if they haven't addressed those  
9 questions, then you could raise it with me by motion. Okay?

10 MR. JEFFERSON: Yes, Your Honor.

11 THE COURT: Okay. Is there anything else we need to  
12 discuss?

13 MR. MESTER: No, Your Honor.

14 THE COURT: So you will be hearing from me with  
15 regard to all of those other cases and claims that are still  
16 out there. And with regard to the settlement, I will see you  
17 at the next status hearing.

18 MR. MESTER: Okay.

19 THE COURT: If there's anything that comes up between  
20 now and then, just let me know.

21 MR. EDELSON: Thank you, Your Honor.

22 MR. MESTER: Thank you, Your Honor.

23 MR. BERMAN: Thank you.

24 THE COURT: Okay. Thank you.

25 (Proceedings concluded.)

C E R T I F I C A T E

I, Colleen M. Conway, do hereby certify that the foregoing is a complete, true, and accurate transcript of the proceedings had in the above-entitled case before the HONORABLE JOHN Z. LEE, one of the Judges of said Court, at Chicago, Illinois, on July 14, 2016.

/s/ Colleen M. Conway, CSR, RMR, CRR

07/27/16

Official Court Reporter  
United States District Court  
Northern District of Illinois  
Eastern Division

Date